

Regulating for Globalization

Trade, Labor and EU Law Perspectives

Work in the EU: The Internal Dimension

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Introduction

This blog constitutes the third instalment in a series of blogs about the nature of work and the purpose of labour regulation, with a specific focus on work in the EU. To recap, thus far I have argued that:

- All human activity is skilled activity;
- The hallmark of work is productivity, and hence work involves the productive use of one's skills;
- The right to work is fundamental in permitting and enabling people to use and deploy their skills, subject to market demand; and
- The right to work is viewed as foundational in international and European law in allowing people to work.

The question which now arises is what link, if any, exists between the right to work, which must be understood as the foundational and most basic right related to work, and other, derivative rights in EU law.

Enabling Choice

In the construction of a market, a vital step is ensuring the free movement of the factors of production—goods, services, capital and labour. As noted in my latest blog post ([“On the Nature of Work and the Purpose of Labour Law: Part II”](#)), in a market economy labour is indeed a commodity. And, at least from one point of view, facilitating the free movement of labour and service providers contributes to people's welfare. Indeed, according to one economic perspective (the ‘neo-classical’ one), the free movement of the factors of production should result in the most efficient allocation of resources in society, leading to the maximisation of consumer welfare and the satisfaction of consumer choice.

Accordingly, at least from the neo-classical economic perspective, enabling the free movement of the factors of production is critical to the maximisation of overall welfare and the ability of society to meet the demands of consumers. While the right to work may be *the* fundamental threshold condition facilitating participation in the market, freedom of movement within the confines of the market is an important derivative right of the right to work. Being allowed to move anywhere in the market to productively use one's skills must be understood as central to one's personal liberty and freedom to make choices which affect one's life and livelihood.

There is a further derivative right of the right to work which is fundamental in facilitating free movement. That is the right to have one's skills recognised to permit one to work in the market. Indeed, without having one's skills recognised by appropriate authorities—those governing access to professions or employers—one would not be able to participate and move in the market effectively because one would not be valued as a person with certain skills. To put it another way, one would not receive the respect, admiration and resources a person of X skill level deserves according to the laws of supply and demand. Nor would one be able to advertise and promote one's skills without effective recognition being given to them. To put it another way, the use of one's skills frequently requires recognition of them. One cannot use them if they are not recognised—if one cannot furnish proof of a certain level of skill.

It is interesting to note in this vein that empirical data has confirmed the significance of qualification recognition in intra-EU professional services trade. In general, this research concludes that there is a positive correlation between trade in professional services and the recognition of qualifications. Furthermore, the more one member state recognises the qualifications of another, the greater the chance of increased labour migration and service provision to that same member state.[1] In sum, effective access to and participation in the market requires that one's skills be recognised for what they are—the attainment of a certain level of skill and knowledge. Accordingly, it is appropriate to consider what measures, if any, the EU adopts in respect of skills recognition.

Recognition of Skills in the Single Market

Skills recognition measures in the Single Market vary significantly.

Recognition of Professional Qualifications

A first is that found in Directive 2005/36/EC as amended, the so-called 'Recognition Directive', which facilitates the mutual recognition of professional qualifications when workers or service providers (both of which are different types of 'workers', according to the definition of work adopted in the previous blog post) move between jurisdictions. By 'mutual recognition', I am referring to the doctrine famously espoused in Case 120/78 *Cassis de Dijon* [1979] ECR 650. There is a general agreement or rule that the factors of production must freely circulate, subject to exceptions. Over time, consumer tastes and demands then adjust, and patterns of uniformity emerge in markets for goods, services and labour, thus leading to the emergence of new markets. According to Kalypso Nicolaïdis suggests, in a regulatory context mutual recognition is a process which involves mutual comparative assessments of rules, standards and norms, in selected areas, by respective national public institutions and regulatory authorities, according to prior agreement. This comparative analysis involves the acquisition of knowledge and information of foreign regulatory regimes by the respective national institutions and authorities. As a result of this mutual learning, national regulators may adapt their own administrative, regulatory and legislative techniques to make their own regulatory systems more attractive. It may also result in the production of harmonised standards between the parties in areas of mutual interest and comparability.[2] In sum, the mutual recognition of qualifications in the Single Market facilitates free movement and heightened competition through the emergence of new standards governing professions, thereby resulting in improved welfare overall and a better ability to satisfy consumer choice.

A case well illustrating the potential effect of the Recognition Directive in this respect is *Burbaud*,

in which the Court of Justice considered the organisation of the profession of hospital manager in France.^[3] The applicant, a Portuguese national, obtained a law degree and a hospital administrator qualification from Portuguese institutions. She worked as a hospital administrator for several years in Portugal, before moving to France, obtaining a doctorate in French law in France and acquiring French nationality. The applicant then applied for admission to the hospital managers' corps of the French public service but was denied admission. The operative reason for denying the applicant admission was that she had not taken an entrance exam required to undergo training to become a hospital manager. The Court first found that the profession of hospital manager in the French public service was a 'regulated profession' within the meaning of the Diplomas' Directive. Next, the Court held that the qualification obtained after completion of the training course required constituted a 'professional qualification' within the meaning of the Diplomas' Directive. Initially, the Court upheld the entrance examination, insofar as it served a 'dual purpose': first, successful performance in the examination facilitated entry to the French state's training college for hospital managers; and, second, successful performance also lead to recruitment as trainees in the public service. Thus, if the applicant's Portuguese qualification was found to be equivalent to that awarded at the end of the training course in France, she would still be required to take the entrance exam but would be exempted from the course itself and the final examination.

The Court then recognised that requiring nationals of other member states to pass an entrance exam to a training course for which they already hold the final qualification constituted an obstacle to the free movement of workers. As such, it required justification. According to the Court, the effect of the entrance exam in such circumstances was to downgrade nationals of other member states and was not necessary to the legitimate objective of seeking the best candidates for the job. The applicant could not therefore be required to undertake the entrance exam. The case suggests that, by being required to recognise the professional qualifications of member state nationals, at least some regulated professions in the EU will need to significantly reform their current organisation, structure and rules, especially those like the profession in *Burbaud* which are quite restrictively regulated. *Burbaud* helps to illustrate the significant effect that the regulatory competition engendered by mutual recognition can have on professions.

Recognition of Non-Formal and Informal Learning

A second consideration must be the possibility of recognising non-formal and informal learning or skills which have been used and developed outside formal learning contexts, such as higher education. The point of recognising such skills is to institutionalise knowledge, competencies and skills which would otherwise remain informal. To put it another way, it provides the opportunity for productive activity—work—which would otherwise be de-institutionalised and unpaid to become organised, institutionalised and possibly paid.

The key measure in respect of the recognition and validation of non-formal and informal learning is the Council Recommendation on the validation of non-formal and informal learning ('the Recommendation').^[4] In the recitals to the Recommendation, the Council notes that validating non-formal and informal learning can 'play an important role in enhancing employability and mobility, as well as increasing motivation for lifelong learning, particularly in the case of socio-economically disadvantaged or the low-qualified'.^[5] The Recommendation therefore acknowledges the need to recognise the skills of those who are likely to be most vulnerable and at risk of social exclusion and isolation. It gives such groups the opportunity to live their way of life through the recognition of the skills they have acquired, even though they may not be traditionally recognised as valued in the community. This is strongly consistent with the requirements of

freedom as non-domination insofar as recognises the skills and values of the worst-off. And the breadth or scope of application of the Recommendation is significant. For example, the Recommendation defines ‘informal learning’ as ‘learning resulting from daily activities related to work, family or leisure and is not organised or structured in terms of objectives, time or learning support; it may be unintentional from the learner’s perspective’.[6] Expressly included in the definition of ‘informal learning’ is ‘activities at home (eg taking care of a child)’.[7] This is precisely the sort of activity which we mentioned in chapter 2, section II.A that is often overlooked in assessing what work is and involves.

According to the Recommendation, the member states should have in place, no later than 2018, arrangements for the validation of non-formal and informal learning, providing candidates with the possibility of obtaining some sort of qualification, in whole or in part, in respect of their non-formal and informal learning. According to the council, validating such learning through the provision of qualifications ‘can increase (...) participation in lifelong learning and (...) access to the labour market’.[8] While much of the above is welcome, there are several drawbacks to the Recommendation. For one, it is only a Recommendation. While Council recommendations are taken seriously by the member states, strictly speaking there is no obligation on the member states to implement their terms. In respect of this Recommendation specifically, Lilli Casano has demonstrated that the member states have been slow to implement its terms and many member states have simply made no effort at all. Moreover, where efforts have been made, key stakeholders such as employers associations and trade unions have not been sufficiently involved. Furthermore, there has been a strong tendency towards ‘formalisation’, i.e., validation of skills obtained in an informal context but without a correlate focus on ensuring that people can subsequently benefit from such validation, i.e., obtaining paid employment.[9]

Conclusion

Summing up, I have argued that to facilitate work—the productive use of one’s skills—ensuring people’s freedom of choice, particularly through their freedom of movement, is vital. And one of the most important rights in facilitating free movement is the right to have one’s skills recognised so as to enable one to deploy one’s skills, subject to market demand. The possibility of recognising non-formal or informal skills was also noted as a way of providing what I describe as unpaid workers opportunities to convert their labour into paid productivity.

[1] Hildegunn Kyvik Nordås, ‘Does Mutual Recognition of Professional Qualifications Stimulate Service Trade? The Case of the European Union’ (2016) 48 *Applied Economics* 1852; and Stella Capuano and Silvia Migali, ‘The Migration of Professionals within the EU: Any Barriers Left?’ (2017) 25 *Review of International Economics* 760.

[2] See Wolfgang Kerber and Roger Van den Bergh, ‘Mutual Recognition in the Global Trade Regime: Lessons from the EU Experience’ in Ioannis Lianos and Okeoghene Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (CUP 2012).

[3] Case C-285/01 *Burbaud* [2003] ECR I-8219.

[4] [2012] OJ C398/1.

[5] The Recommendation, recital 1.

[6] The Recommendation, Annex (c).

[7] *ibid.*

[8] *ibid.*, art 1(3)(c).

[9] Lilli Casano, ‘The Future of European Labour Law and the Right to Employability: Which Role for the Validation of Non-Formal and Informal Learning?’ (2016) 7 ELLJ 498.

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